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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

JAMES GOMEZ, Director, Department of Corrections, and THEO WHITE, Warden, *Petitioners*,

v.

JAMES THOMAS HART, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
BRUCE ORTEGA
Deputy Attorney General
*RENÉ A. CHACÓN
Supervising Deputy Attorney General
*Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664
Telephone: (415) 703-5957
Fax: (415) 703-1234
Counsel for Petitioners

4398

QUESTION PRESENTED

Whether a reviewing court owes deference to a state trial court's credibility determination in the context of an ineffective assistance of counsel determination, and whether that deference extends to the examination of the prejudice asserted.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONS, STATUTES OR REGULATIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
ARGUMENT	8
I. THE PUBLISHED DECISION ERRS IN OVERLOOKING THE STATE COURTS' CONCLUSION THAT A REASONABLE STRATEGIC DECISION JUSTIFIED TRIAL COUNSEL'S OMISSION AND ERRS IN ITS PREJUDICE ANALYSIS IN NOT GIVING SUFFICIENT WEIGHT TO THE STATE TRIAL COURT'S CONCLUSIONS THAT THE EVIDENCE OF RESPONDENT'S GUILT WAS OVERWHELMING	8
A. Deficient Performance	9
B. Prejudice	16
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
Cases	
Burger v. Kemp 483 U.S. 783 107 S.Ct. 3114 97 L.Ed.2d 638 (1987)	12-15
Dwyer v. United States 716 F.Supp. 1337 (S.D. Cal. 1989)	13
Hart v. Gomez 174 F.3d 1067 (9th Cir. 1999)	1, 6, 7, 9, 10, 13-16, 18
Jeffries v. Wood 103 F.3d 827 (9th Cir. 1996)	13
Kuhlman v. Wilson 477 U.S. 436 106 S.Ct. 2616 91 L.Ed.2d 364 (1986)	14
Lindh v. Murphy 521 U.S. 320 117 S.Ct. 2059 138 L.Ed.2d 481 (1997)	14
Noltie v. Peterson 9 F.3d 802 (9th Cir. 1993)	15
People v. Delgado 5 Cal. 4th 312 851 P.2d 811 19 Cal. Rptr. 2d 529 (1993)	14, 15

TABLE OF AUTHORITIES, CONT'D

People v. Wallin
124 Cal. App. 3d 479
177 Cal.Rptr. 303 (1981) 14

Strickland v. Washington
466 U.S. 668
104 S.Ct. 2054
80 L.Ed.2d 674 (1984) 9, 10, 12, 14, 16, 19

Sumner v. Mata
449 U.S. 539
101 S.Ct. 764
66 L.Ed.2d 722 (1981) 14

United States v. Bafia
949 F.2d 1465 (7th Cir. 1991) 13

United States v. Clizer
464 F.2d 121 (9th Cir. 1972) 13

United States v. Swanson
943 F.2d 1070 (9th Cir. 1991) 13

Williams v. Calderon
52 F.3d 1465 (9th Cir. 1995) 15

Constitutional Provisions

United States Constitution
Sixth Amendment 2, 12, 14

TABLE OF AUTHORITIES, CONT'D

Statutes

28 United States Code
- § 1254(a) — 2
- §§ 2241-2255 — 13
- § 2253 — 6
- § 2254(d) — 2-3, 13, 14, 17
- § 2254(e)(1) — 13

California Penal Code
- § 288(a) — 3
- § 288a(c) — 3
- § 1203.066(a)(9) — 3
- § 1203.066(a)(10) — 3

California Evidence Code
- § 352 — 11

Court Rules

Rules of the Supreme Court of the United States
- Rule 10 — 2, 6
- Rule 12.7 — 2

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JAMES GOMEZ, Director, Department of Corrections, and THEO WHITE, Warden, *Petitioners*,

v.

JAMES THOMAS HART, *Respondent*.

OPINION BELOW

Petitioners respectfully petition for a writ of certiorari to review the April 26, 1999, decision of the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") in *Hart v. Gomez*, 174 F.3d 1067 (9th Cir. 1999), *amended*, June 15, 1999 (No. 98-15932) (Appendix A), which reversed the judgment of the United States District Court for the Northern District of California. The district court denied respondent Hart's petition for a writ of habeas corpus. Respondent is a parolee of the California Department of Corrections, after having served a state prison sentence following a conviction in the Napa County Superior Court.

Petitioners have included the following orders and opinions as Appendices: (A) the Ninth Circuit's opinion in *Hart v. Gomez, supra*, 174 F.3d 1067, authored by Judge Reinhardt; (B) the Ninth Circuit's Denial of Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc, filed June 15, 1999, along with amendments to the April 26 opinion.

Pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States, petitioners will cite to or quote from the record, even though the record has not been transmitted to the Court.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on April 26, 1999. On June 15, 1999, the Ninth Circuit denied petitioners' Petition for Rehearing With Suggestion for Rehearing En Banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(a) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONS, STATUTES OR REGULATIONS

The Sixth Amendment to the United States Constitution reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Former 28 U.S.C. § 2254(d) reads as follows:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the

> judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . .

STATEMENT OF THE CASE

A Napa County Superior Court convicted respondent in October 1990 of three counts of lewd and lascivious conduct upon a child under 14, Cal. Pen. Code § 288(a), and three counts of oral copulation, *id.* at § 288a(c). The jury also found true the special allegations that in committing two of the lewd and lascivious acts respondent committed acts of substantial sexual conduct while violating a position of special trust which he held with the victim, *see* former Cal. Pen. Code at § 1203.066(a)(9), and used matter depicting sexual conduct, *id.* at § 1203.066, then (a)(10), now (a)(9).[1/]

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1. The People of the State of California charged respondent in this case in count 1 with lewd and lascivious conduct upon a child under the age of 14 in or during 1984. In count 2 the People charged respondent with lewd and lascivious conduct upon a child under the age of 14 on or between September 1, 1986, and December 31, 1986; count 3 charged oral copulation with a child under the age of 14 on or between September 1, 1986, and December 31, 1986; count 4 charged lewd and lascivious conduct upon a child under the age of 14 on or between January 1, 1987, and July 3, 1987; count 5 charged oral copulation with a child under the age of 14 on or between January 1, 1987, and July 3, 1987; count 6 charged oral copulation with a child under the age of 14 between January 1, 1987, and July 3, 1987, subsequent to the act occurring in count 5; and count 7 charged lewd and lascivious conduct upon a child under the age of 14 on or

On August 7, 1991, the state superior court sentenced respondent to 12 years in prison, computed as follows: the court imposed the upper term of eight years on the count 3 oral copulation conviction, plus consecutive terms of two years each on the count 5 oral copulation conviction and count 7 lewd and lascivious conduct upon a child conviction. The court imposed eight-year terms on the remaining count 6 oral copulation conviction and on the remaining two convictions for lewd and lascivious acts upon a child, but ordered these terms to run concurrently with each other and all others.

Respondent first attacked the judgment returned against him by filing a motion in the superior court requesting a new trial. Respondent contended that his trial counsel had negligently failed to introduce -- or even to investigate -- evidence which allegedly supported the credibility of an alibi witness.

The trial court denied the motion and on direct appeal respondent contended, *inter alia*, that the trial court had erred. Respondent vehemently reiterated that his trial counsel had provided him with inadequate assistance with respect to the important alibi witness.

The California Court of Appeal rejected the assignment of error, and all others, and affirmed the judgment of conviction.

Subsequently, respondent asked the California Supreme Court to review the California Court of Appeal opinion affirming the judgment. Specifically, one of petitioner's four high court contentions concerned the performance of his trial attorney. Respondent again claimed that this counsel had negligently failed to prepare for trial in not investigating the alleged corroboration of the testimony of the important defense witness. On April

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between July 5, 1987, and December 31, 1987. It was only the count 1 charge of lewd and lascivious conduct upon a child under the age of 14 in or during 1984 on which the jury acquitted respondent.

20, 1994, the state high court denied respondent's request for review.

On March 27, 1995, respondent filed a petition for a writ of habeas corpus in his trial court -- the Napa County Superior Court. Once again respondent alleged that his trial attorney had provided him with ineffective assistance in that counsel had failed to introduce -- or even to investigate -- evidence which allegedly supported the credibility of the alibi witness. On May 26, 1995, respondent's trial judge denied respondent's request for a writ of habeas corpus, referencing its earlier ruling on the new trial motion as well as the opinion of the California Court of Appeal on direct review.

Apparently respondent next filed his petition anew in the California Court of Appeal, for on October 18, 1995, the intermediate state court issued an order denying a request from respondent for habeas corpus relief.

On October 25, 1995, respondent filed a petition for review in the California Supreme Court, asking it to review the court of appeal's denial of the petition for a writ of habeas corpus. In this petition respondent maintained his claim, among others, that the jury would have acquitted him but for his trial lawyer's inexcusable failure "to investigate, interview, and present evidence" regarding the so-called alibi witness.

On November 29, 1995, the state high court declined to review respondent's assertions and the court of appeal's refusal to grant respondent habeas corpus relief.

On January 17, 1996, respondent filed a petition for a writ of habeas corpus in the district court, primarily raising the ineffective assistance claim he had litigated through the state courts. On February 15, 1996, the district court found the claim cognizable. The district court denied respondent's federal habeas corpus petition on March 26, 1998.

Respondent filed a notice of appeal on April 22, 1998, and the district court granted petitioner a certificate of probable cause on May 11, 1998.

On April 26, 1999, the Ninth Circuit, per Judge Reinhardt, in a published decision it later amended on June 15, 1999 (No. 98-15932) (Appendices A & B), reversed the judgment of the United States District Court for the Northern District of California.

Also on June 15, 1999, the Ninth Circuit denied petitioners' Petition for Rehearing With Suggestion for Rehearing En Banc. On June 30, 1998, the Ninth Circuit denied petitioners' Motion for Stay of Mandate Pending Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for two reasons: First, the Ninth Circuit's *Hart* opinion overlooks an important state court factual finding on whether trial counsel performed effectively. Second, in its analysis of the prejudice from the ineffective assistance it found, the *Hart* court failed to give the appropriate significance to respondent Hart's admissions of guilt, and correspondingly failed to give appropriate deference to the state trial court's factual findings concerning the "overwhelming" evidence of Hart's guilt.

Rule 10 of the Rules of the Supreme Court of the United States ("Rule 10") describes the considerations governing review on certiorari. It provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring

> the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; . . .
>
> . . . . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In the present case, certiorari should be granted for the two reasons noted above. *Hart* conflicts with United States Supreme Court authority, as well as California Supreme Court authority, on the deference reviewing courts owe state trial court findings on the important federal question of ineffective assistance of counsel.

ARGUMENT

THE PUBLISHED DECISION ERRS IN OVERLOOKING THE STATE COURTS' CONCLUSION THAT A REASONABLE STRATEGIC DECISION JUSTIFIED TRIAL COUNSEL'S OMISSION AND ERRS IN ITS PREJUDICE ANALYSIS IN NOT GIVING SUFFICIENT WEIGHT TO THE STATE TRIAL COURT'S CONCLUSIONS THAT THE EVIDENCE OF RESPONDENT'S GUILT WAS OVERWHELMING

The State charged respondent Hart with molesting his young daughter Jennifer during their visits to the "R-Ranch" cabins at Lake Berryessa in Napa County between September 1986 and August 1987. The prosecution relied primarily on Jennifer's testimony that respondent molested her only during their visits to the R-Ranch and never when accompanied by another adult. Respondent's girlfriend Deanne Kendall testified on his behalf, and stated that she had accompanied respondent *on every* weekend he took Jennifer and her brother to the R-Ranch between September 1, 1986, and September 1, 1987. The jury disbelieved Kendall because it convicted respondent.

The Ninth Circuit accepted the ineffective assistance of counsel argument that all of the California courts, as well as the district court, rejected: that trial counsel provided respondent with prejudicially negligent lawyering because counsel knew of, but did not investigate and present, Kendall's credit card receipts from motels where she and respondent stayed on Friday nights; receipts from a grocery store located on the route to the

R-Rancn; and notes on her personal calendars regarding their trips to the R-Ranch. "Kendall's receipts and records provided remarkably strong corroboration for her otherwise uncorroborated testimony . . . their introduction would have in all likelihood convinced the jury that she was . . . telling the truth . . . " *Hart v. Gomez, supra*, 174 F.3d at 1073.

A. Deficient Performance

To briefly restate the governing principle, to establish ineffective assistance of trial counsel, a criminal defendant must satisfy the two prongs set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2054, 80 L.Ed.2d 674 (1984). Under *Strickland*, a habeas petitioner like respondent must first show that counsel performed deficiently. 466 U.S. at 687. Upon establishing deficient performance, the petitioner must then show that the deficient performance prejudiced the defense. *Id.*

Here, the *Hart* court first found ineffective assistance in trial counsel's decision not to introduce defense witness Deanne Kendall's calendar, and grocery and motel receipts, in support of her testimony that she accompanied respondent on every weekend he took Jennifer and her brother to the R-Ranch between September 1, 1986, and September 1, 1987. Again, the People had charged respondent with molesting his daughter Jennifer during their visits to the R-Ranch between September 1986 and August 1987. Jennifer testified that respondent molested her *only* during their visits to the ranch, and never when one of respondent's girlfriends, or one of her or her brother's friends, stayed with them.

A reviewing court can find ineffectiveness only where it can conclude that there are no circumstances under which the challenged trial counsel action or

omission might be considered sound trial strategy. *Strickland v. Washington, supra*, 466 U.S. at 689. Here, the *Hart* panel held it "simply inconceivable" that respondent's attorney had a tactical reason not to introduce Kendall's records:

> . . . the evidence corroborating Kendall's testimony would serve to refute the charges that molestation occurred during the period charged in the information. Second, there is no reasonable strategy that could account for defense counsel's failure to introduce this corroborating evidence. Defense counsel called Kendall as a witness and had her testify to the fact that she was with Hart at the ranch at all relevant periods. In doing so, he made the strategic decision to rely on the assertion that Hart was always accompanied by an adult companion when he took his children to the R-Ranch. Having chosen to pursue this line of defense, it is simply inconceivable that defense counsel's decision not to introduce documentary evidence fully *corroborating* Kendall's testimony was a strategic one.

Hart v. Gomez, supra, 174 F.3d at 1071 (original emphasis, footnotes omitted).

The *Hart* court overlooks the fact, however, that the trial court in this case, the judge who observed Kendall testify (and who was the person in the best position to not only judge Kendall's credibility but the performance of counsel), found that defense counsel had a reasonable strategic reason not to introduce Kendall's records. In ruling on respondent's motion for a new trial premised upon his current challenge to trial counsel's competence, the state trial court held:

> Now, in looking at these notes, these calendar notes, frankly they, [petitioner's new counsel on the motion for new trial], characterized the lady as being an obsessive calendar keeper. I guess I would have to agree with that. I always thought I was obsessive, but I don't describe on alternating days what color underwear I either wore or planned to wear. I mean, the calendar is a little strange. Maybe there's a reason for it, I don't know, but it certainly would have opened the door up potentially to -- assuming it had come in, and [the current prosecutor] I think raises a good point that there would have been a threshold question at least to its admissibility -- but had I ruled it in, I could see the D.A. . . . , who was just as aggressive as [defense counsel] was, and I'm sure he would have wanted to have gone into this in some detail about testing her recollection about different things and asking her questions about some of the entries in here. References in here to the hot tub -- again, that might be perfectly innocent, who knows. Might have been irrelevant; 352 objection might have been sustained, probably would have. Why she makes a note of what color lingerie she's wearing on different days, I don't know. It's a little bit unusual, I think, and might have prompted an inquiry out of the presence of the jury as to what that all related to, and I might have sustained a 352 objection.[2]

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2. California Evidence Code section 352 reads this way: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading

Subsequently the trial court ruled that "even had this extra evidence come into evidence, I don't think it would have made the slightest difference in the outcome of this case, and if anything, *it might have made matters worse*." (Emphasis added.) Clearly the trial judge, through his comments, was holding that counsel did not present Kendall's records because that evidence, rather than corroborate Kendall's direct examination testimony, might have led to damaging cross-examination. Indeed, as the state court of appeal held in reviewing the trial court's ruling, given that the trial court found, *inter alia*, that introduction of Kendall's supporting information "might have led the prosecution to bring in other, impeachment evidence, which might have been damaging to Hart's case . . . . It follows that a reason has been established for trial counsel's decision not to pursue the evidence at issue."[3]

The reasoning behind trial counsel's decision not to introduce Kendall's records was rational and within "the wide range of professionally competent assistance." *Strickland v. Washington, supra*, 466 U.S at 687. In *Burger v. Kemp*, 483 U.S. 783, 791-794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), this Court validated as reasonable under the Sixth Amendment a defense attorney's decision not to present mitigating evidence at the penalty phase of a capital trial because, while on one hand the evidence might have been helpful, on the other hand it could have also led to damaging cross-examination. *Burger v. Kemp* clearly teaches that defense counsel need not introduce, as in this case, "corroborative" evidence that could cause more harm than good.

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the jury."

3. The state court of appeal also opined that the previously-quoted comments of the trial court constituted a holding "that the prosecuting witness's testimony was extremely strong and credible, and that the credibility of Kendall, with or without her calendar or receipts, was slight."

Hart is patently contrary to this Court's decision in *Burger v. Kemp*.

Furthermore, while it is true that appellate courts review the question of trial counsel's competence de novo, *United States v. Swanson*, 943 F.2d 1070, 1072 (9th Cir. 1991), under the law applicable to this case the Ninth Circuit was obligated to defer to the factual findings made by the state courts. *See former* 28 U.S.C. § 2254(d).[4] The findings of the state trial court regarding Kendall's calendar, and how its "unusual" nature would have "made matters worse" for respondent had it been introduced, is a finding related to credibility -- the preeminent factual question -- and one the Ninth Circuit failed to address or defer to. Respect for it, and respect for the tactical decision counsel made, leads to the conclusion that trial

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4. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, provides federal habeas corpus reform for both capital and noncapital cases. Title 1 of the Act amended sections 2241-2255 of Title 28 of the United States Code, including moving the "presumption of correctness" requirement from § 2254(d) to § 2254(e)(1).

President Clinton signed the AEDPA into law on April 24, 1996. Its amendments do not apply to the present noncapital case because respondent Hart filed his habeas petition with the district court on January 17, 1996, almost three months *before* President Clinton signed the AEDPA into law. Absent an explicit effective date in legislation, an act becomes effective on the date it is signed into law by the president. *United States v. Bafia*, 949 F.2d 1465, 1480 (7th Cir. 1991), *cert. denied, sub nom.*, 504 U.S. 928, 112 S.Ct. 1989, 118 L.Ed.2d 586 (1992); *United States v. Clizer*, 464 F.2d 121, 123, n. 2 (9th Cir. 1972), *cert. denied*, 409 U.S. 1086, 93 S.Ct. 697, 34 L.Ed.2d 673; *Dwyer v. United States*, 716 F.Supp. 1337, 1341 (S.D. Cal. 1989). Because the federal habeas reform provisions of the AEDPA contain no explicit effective date, they became effective as of April 24, 1996. *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996). This Court has ruled that the Act is not retroactively applicable to federal habeas petitions like respondent's present one, filed, as noted, on January 17, 1996. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2063, 138 L.Ed.2d 481 (1997).

counsel did not violate the professional norms of the Sixth Amendment. *Hart* not only violates this Court's *Burger v. Kemp* decision, but also the presumption-of-correctness principle of former 28 U.S.C § 2254(d) and this Court's decisions in *Kuhlman v. Wilson*, 477 U.S. 436, 459, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), and *Sumner v. Mata*, 449 U.S. 539, 541, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

Likewise, *Hart v. Gomez, supra*, 174 F.3d 1067, violates the California Supreme Court's decision in *People v. Delgado*, 5 Cal. 4th 312, 851 P.2d 811, 19 Cal. Rptr. 2d 529 (1993). In *Delgado* the state high court held that appellate court's owe deference to, as here, the credibility determinations trial courts make on new trial motions.[5] *Hart* even violated the Ninth Circuit's own rule that deference by reviewing courts to the strategic decisions of counsel applies notwithstanding the appellate concerns arising from a cold record. *Noltie v. Peterson*, 9 F.3d 802, 807 (9th Cir. 1993).[6]

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5. *See also People v. Wallin*, 124 Cal. App. 3d 479, 483, 177 Cal. Rptr. 303 (1981): "The trial judge is the one best situated to determine the competency of defendant's trial counsel. Where, as here, defendant is represented by different counsel at the motion for new trial and the issue is called to the trial court's attention, the trial judge's decision is especially entitled to great weight and we defer to his fact finding power."

6. The Ninth Circuit claimed that "the state does not claim that defense counsel's decision was a strategic one." *Hart v. Gomez, supra*, 174 F.3d at 1071, n. 7. The State respectfully submits that that footnote is mistaken. In our pleadings in the district court we vigorously argued that counsel did not provide deficient performance. The district court did not address that question, however, because it followed this Court's suggestion that a court need not determine whether a defense attorney's performance was negligent before examining whether counsel's client suffered prejudice from the alleged negligence. *Strickland v. Washington, supra*, 466 U.S. at 697. The district court found, of course, that no prejudice flowed to respondent from his attorney's assumed negligence. In our brief in the Ninth

And, that counsel had a strategic reason not to introduce Kendall's calendar and receipts, and thus the Ninth Circuit erred under *Burger v. Kemp* and *People v. Delgado*, is further evinced by the following fact: rather than corroborate, the records would have *contradicted* Kendall's testimony that she was with respondent and his children everytime they went to the R-Ranch between September 1, 1986, and September 1, 1987. As the district court pointed out, in his traverse in that court respondent presented a graph not only comparing the R-Ranch records with Kendall's records, but showing that on two weekends during the time period in question Kendall *did not* accompany respondent to the ranch. Kendall even admitted as much in her district court declaration. How was trial counsel negligent for not introducing Kendall's records to corroborate her trial testimony that she was with respondent and his children every time they went to the R-Ranch when both respondent and Kendall now admit she did not go every time?

The Ninth Circuit discounted any contradiction. Although it recognized that the record "reflects the fact that Hart was at the R-Ranch on two occasions between September 1986 and August 1987 without Kendall, namely April 25 and August 15, 1987," it states further that the R-Ranch custodian of records and the R-Ranch records

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Circuit we confined our analysis to that question as well. In *Williams v. Calderon*, 52 F.3d 1465, 1470, n. 3 (9th Cir. 1995), *cert. denied*, 516 U.S. 1124, 116 S.Ct. 937, 133 L.Ed.2d 863 (1996), the Ninth Circuit applauded the consideration of only prejudice in an ineffective assistance of counsel case, noting that where the absence of prejudice is clear a court does well to "decline the enterprise" of addressing the question of deficiency. As we thought we made clear at oral argument in the Ninth Circuit in the instant case, however, by focusing primarily on prejudice we were not abandoning the position we had followed all along -- that respondent's trial counsel did not perform negligently because he had a tactical reason to not introduce Kendall's records.

themselves made clear that "on neither of these occasions did Hart's children accompany him to the ranch." *Hart v. Gomez, supra*, 174 F.3d at 1070, n. 5. In reaching that conclusion the Ninth Circuit ignored two facts: that records custodian Hodge also testified that the R-Ranch records could not account for who might come and go over the course of a group's stay at the ranch, and that even Kendall declared that the R-Ranch records do not accurately reflect how many people were in a party using a ranch cabin because the R-Ranch staff rarely took a "head-count" to confirm the reported number of visitors with the actual number.[7]

B. Prejudice

Assuming, arguendo, that respondent's trial counsel provided ineffective assistance, does there exist "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different"? *Strickland v. Washington, supra*, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the verdict." *Id.* Neither the state trial court, nor the district court, found *prejudicial* ineffectiveness in this case. At one point in its decision

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7. The *Hart* panel noted that it "conducted an independent review of Kendall's records" and "determined that those records clearly and convincingly corroborate Kendall's testimony." *Hart v. Gomez, supra*, 174 F.3d at 1070, n. 6. However, *Hart* does not address the alleged error in the reasoning of the district court on the same question: "Kendall's records and receipts do not conclusively show that she was at the R-Ranch on the weekends in question because the motel and grocery receipts do not actually place her at the R-Ranch. They simply show that she spent some Friday evenings at a motel in Fairfield and that she bought groceries on some Saturday mornings in Fairfield."

denying petitioner federal habeas corpus relief the district court opined:

> Hart made the same ineffective assistance of counsel argument in his motion to the trial court judge for a new trial. The court reviewed Kendall's affidavit describing her routine of staying at a motel on Friday nights with Hart and buying groceries the next morning for weekend visits with Hart's children at the R-Ranch. The court also reviewed Kendall's attached receipts and calendars. The trial court judge, of course, had heard Jennifer's, as well as Kendall's testimony, and the rest of the evidence in the case. The court denied the motion, stating:
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> > There is just no doubt in my mind that the same result would have been reached in this case whether this reportedly unoffered evidence was given or not. The evidence of Mr. Hart's sexual involvement with his daughter was just overwhelming, and the level of his denial is manifest during the trial was -- and denial in the sense of any wrong-doing was difficult, frankly, to understand given the magnitude of the evidence against him.
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> RT Vol. XX, pg. 36.
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> As discussed above, under former 28 U.S.C. § 2254(d) State court factual findings are entitled to a presumption of correctness on federal habeas review. See Sumner v. Mata, 449 U.S. 539, 541 [101 S.Ct. 764, 66 L.Ed.2d 722] (1981). This Court therefore applies a presumption of correctness to the State court findings.

The district court opined further that the prosecution's evidence introduced at trial "pointed overwhelmingly towards Hart's guilt. The jury not only had Jennifer's testimony to consider, but it also had the taped phone conversation between Hart and [Jennifer's mother Mrs.] Lamp, and the letter Hart wrote to Lamp soon after Lamp's phone call, in which Hart stated that he had never meant to hurt Jennifer and hoped Jennifer had forgotten. Both of Hart's admissions were made in response to Lamp's accusations that Hart molested Jennifer."

The Ninth Circuit, however, found prejudice, premised in part upon the rejection of the idea that the letter and phone call could be considered "overwhelming evidence" of guilt rendering any ineffective assistance of counsel harmless under *Strickland*. *Hart* holds that while in the above phone call respondent admitted he had molested his daughter, "there is no indication . . . Hart molested her during the time period charged in the information." *Hart v. Gomez, supra*, 174 F.3d at 1072. *Hart* concludes further that during the call respondent claimed that no molestation had occurred for several years because he said he had not "done it for a long time." *Id.* The Ninth Circuit noted next that while in his letter respondent admitted having molested Jennifer in the past, the letter "provides no evidence that Hart molested Jennifer during the period of time charged in the information, but rather supports a contrary conclusion. In the letter, Hart admits that he molested Jennifer as a result of what he termed a 'psycho-sexual disorder' and a 'psychosis.' He goes on to write, however, that he 'transcend[ed] [his] psychosis' and received a clean bill of psychological health in 1986." *Id.*

Petitioners submit that the Ninth Circuit did not look at the evidence the way the jury would have, the way a reviewing court must to give meaning to this Court's teaching that reversal is in order from ineffectiveness only

when there exists "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Strickland v. Washington, supra*, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the verdict." *Id.* For example, while the Ninth Circuit did not have Kendall's records before it, it did have (although ignored by the Ninth Circuit) the evidence that elsewhere in the December 1989 phone call between respondent and his ex-wife he said, regarding Jennifer, "we haven't 'fooled around,' quote unquote in a long time, a couple years, three years, I don't know how many years." In light of that statement in the phone call, and all of the other evidence in this case, including, as the state court of appeal ruled, the "extremely strong and credible" testimony of Jennifer, the jury would have concluded that respondent did admit to molestation during the time period charged in the information. The jury would not have concluded from the "clean bill of psychological health in 1986" statement in the letter that all molestation ceased prior to September 1, 1986; it would have concluded that respondent's admission corroborated Jennifer and outweighed any credibility the jury might have given to Kendall's records accompanying her testimony.

There is no reasonable probability that introduction of Kendall's records would have helped Hart at trial. Confidence in the verdict is not undermined.

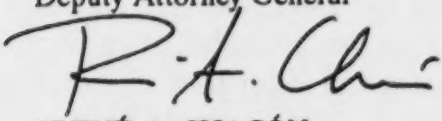
CONCLUSION

Accordingly, for all of the foregoing reasons, petitioners respectfully ask that this Court grant certiorari and resolve the important issues of law presented herein.

Dated: July 12, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
BRUCE ORTEGA
Deputy Attorney General



*RENÉ A. CHACÓN
Supervising Deputy Attorney General
*Counsel of Record

Counsel for Petitioners

BO:jkh
SF1999FA0027

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES THOMAS HART,	)	
Petitioner-Appellant,	)	**No. 98-15932**
	)	
v.	)	**D.C. No.**
	)	**CV 96-00239-CW**
JAMES GOMEZ, Director,	)	
Department of Corrections;	)	**ORDER AND**
THEO WHITE, WARDEN,	)	**AMENDED**
Respondents-Appellees.	)	**OPINION**
	)	

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
February 8, 1999 -- San Francisco, California

Filed April 26, 1999
Amended June 15, 1999

Before: Phyliss Kravitch,[1] Stephen Reinhardt, and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Reinhardt

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1. The Honorable Phyllis Kravitch, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, Sitting by Designation.

OPINION

REINHARDT, Circuit Judge:

James Thomas Hart appeals the district court's denial of his petition for a writ of habeas corpus. Although Hart has now completed serving his sentence, he filed his petition in January 1996 while still in prison. Because we find that Hart received ineffective assistance of counsel when his trial attorney failed to investigate and introduce evidence central to petitioner's defense, we reverse.

I.
BACKGROUND

In an information filed on August 29, 1990, Hart was charged with molesting his daughter, Jennifer, during their visits to the R-Ranch camping resort between September, 1986 and August, 1987.[2] At trial, the prosecution relied primarily on Jennifer's testimony. Jennifer told the jury that between September, 1986 and August, 1987, she had been molested by her father, but *only* during visits to the R-Ranch. Most significantly, Jennifer testified specifically that Hart *never* molested her during visits on which he was accompanied by another adult.

Deanne Kendall testified on behalf of the defense. She stated that during the period from September 1, 1986 to September 1, 1987, she was dating Hart and that she accompanied him every weekend he took his children, Jennifer and her younger brother, to the R-Ranch.[3] Before testifying, Kendall informed Hart's attorney that she possessed extensive and detailed records that proved the truthfulness of her contention. She told

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2. The jury was unable to reach a verdict on a count of lewd and lascivious conduct allegedly occurring during 1984 at Hart's residence.

3. Hart's counsel on appeal did not represent him at trial.

him that on the weekends she and Hart visited the R-Ranch, they would stay at a motel in Fairfield on Friday night, pick up the children on Saturday morning, and then spend the remainder of the weekend together at the ranch. She also told counsel that she kept credit card receipts from the motel visits. In addition, she had grocery receipts from Raley's in Fairfield, where she bought groceries on the way to the R-Ranch. Kendall also meticulously recorded all her visits to the ranch on her personal calendars. As Kendall reported to defense counsel before trial, these records demonstrated that she accompanied Hart to the R-Ranch each time he brought his children there between September, 1986 and September, 1987. Despite being informed by Kendall that such remarkable corroborating evidence existed, defense counsel failed to investigate its relevance, or to introduce Kendall's receipts and calendars into evidence. He simply put Kendall on the stand to tell her story without any evidentiary support. Given Jennifer's testimony that Hart never molested her when another adult accompanied Hart to the R-Ranch, the corroborative evidence in Kendall's possession would have raised substantial doubt regarding Hart's guilt of the specific charges in the information. In fact, had Kendall's receipts and records been presented to the jury, it is highly doubtful that a reasonable juror could have voted to convict on those charges.[4].

Following his conviction, Hart moved for a new trial, arguing that his attorney had rendered ineffective assistance of counsel. The trial judge denied the motion

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4. Hart could not, of course, be convicted merely of "being" a child molester. *See, e.g., Robinson v. California*, 370 U.S. 660 (1962). The state charged Hart with committing a series of acts during a specified period of time. It was required to prove that Hart indeed committed the crimes during the period set forth in the information. *See, e.g., United States v. Whitten*, 706 F.2d 1000, 1006 (9th Cir. 1983) (*citing United States v. Rodriguez*, 546 F.2d 302 (9th Cir. 1976)).

and sentenced Hart to 12 years in state prison. Hart's appeal was denied by the California Court of Appeal, and the California Supreme Court, without comment, denied his petition. Hart's post-conviction efforts to obtain relief in the state courts were equally unsuccessful.

Hart filed a petition for writ of habeas corpus in United States District Court, which entered an order denying relief. In its order, the district court stated that the evidence against Hart "pointed overwhelmingly towards Hart's guilt," and therefore, that the introduction of Kendall's receipts and records would not have changed the outcome of the proceeding. Accordingly, the court found that Hart was not prejudiced by the deficient performance it assumed his counsel had rendered.

In this appeal, Hart argues that he is entitled to a writ of habeas corpus because he received ineffective assistance of counsel. He argues forcefully that he was prejudiced by defense counsel's failure to introduce the evidence corroborating Kendall's testimony. We agree, and therefore conclude that Hart's petition must be granted.

II.
DISCUSSION

Hart contends that he was deprived of his Sixth Amendment right to effective assistance of counsel as a result of his attorney's failure to investigate the relevance of and introduce into evidence Kendall's receipts and records. To establish ineffective assistance of trial counsel, a petitioner must satisfy the two prongs set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must first show that his counsel's performance was deficient. *Id.* at 687. To be deficient, counsel's performance must be "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Upon establishing deficient performance, a petitioner must then show that this deficient performance

prejudiced his defense. *Id.* at 687. The petitioner need not show that the deficient performance more likely than not altered the outcome of the case, but must demonstrate only a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Here, the prosecution's primary witness, Hart's daughter Jennifer, testified that during the one-year period covered by the information the molestation occurred exclusively at the R-Ranch and that she was never molested on an occasion when another adult accompanied her father to the ranch. At trial, the state introduced into evidence R-Ranch's records of Hart's visits to the ranch. Linda Hodge, the custodian of records for R-Ranch, testified on cross examination to the specific dates that Hart visited the ranch between September, 1986 and August, 1987. According to the prosecution's witness, Hart visited the ranch on 9/20/86, 11/1/86, 11/15/86, 3/14/87, 4/25/87, 5/1/87, 6/12/87, 6/26/87, and 8/15/87. Hodge's testimony was corroborated by the R-Ranch records.

At trial, Kendall testified that she accompanied Hart every weekend he went to the R-Ranch with his children during the relevant one-year period.[5] Despite the fact that Kendall had records, including calendar entries and receipts from a motel and a grocery store near

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5. The record reflects the fact that Hart was at the R-Ranch on two occasions between September, 1986 and August, 1987 without Kendall, namely April 25 and August 15, 1987. As Hodge's testimony and the R-Ranch records reflect, however, on neither of these occasions did Hart's children accompany him to the ranch. Rather, on both April 25 and August 15, Hart was accompanied by another adult, but not by his children. Accordingly, under the evidence introduced by the prosecution, it is not possible that any molestation occurred on either April 25 or August 15.

the ranch, that verified her claim that she went to the ranch on each weekend that the prosecution's independent records showed that Hart was at the ranch (except for the two weekends that Hart went without his children, see *supra* n.5),[6] defense counsel let Kendall's testimony stand completely uncorroborated. According to Kendall's declaration, defense counsel spent no more than five minutes with her before the trial. During this brief meeting, Kendall informed him that she had the critical corroborating evidence in her possession. According to Kendall, he merely "glanced" at the records. When Kendall pressed him to take the records and introduce them so as to corroborate her testimony, defense counsel responded, "Who's the lawyer here, you or me?" As noted, when Kendall was called as a defense witness, she simply testified without any supporting evidence that she had been with Hart each time he took his children to R-Ranch. Defense counsel failed to investigate or introduce into evidence the records that fully corroborated Kendall's statements. Thus, the jury was left to decide, without benefit of supporting or corroborative evidence, whether Kendall's testimony was truthful and accurate, or whether it was unreliable or offered simply in an effort to assist a former lover.

A lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. Kendall's evidence, if believed by the jury, would have demonstrated the truthfulness of her testimony and established that, in light of Jennifer's testimony, no molestation occurred during the time period set forth in the information -- or at the

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6. We have conducted an independent review of Kendall's records and have determined that those records clearly and convincingly corroborate Kendall's testimony.

least that the molestation as charged in the information had not been proved beyond a reasonable doubt. Rather than investigating the relevance of the records, and introducing them to corroborate Kendall's testimony, defense counsel totally ignored her pleas. Such conduct is "outside the wide range of professionally competent assistance." *Strickland*, at 690.

When faced with similar examples of a defense counsel's failure to investigate or introduce exculpatory evidence, we have concluded that the failure constitutes deficient performance under *Strickland*. In *Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994), for example Sanders challenged his conviction for second degree murder on the ground that his trial counsel had rendered ineffective assistance of counsel. Sanders' brother told defense counsel that he, not his brother, had committed the murder. *See id.* at 1456. Sanders' defense counsel failed to investigate this evidence and to introduce it at trial. *See id.*

We concluded that both the failure to investigate the exculpatory evidence and the failure to introduce the evidence at trial constituted deficient performance. We first held that Sander's counsel had "failed to fulfill his duty to investigate [Sanders'] most important defense." *Id.* at 1457; *see also Strickland*, 466 U.S. at 691 (holding that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *Baylor v. Estelle*, 94 F.3d 1321 (9th Cir. 1996); *United States v. Burrows*, 872 F.2d 915, 918 (9th Cir. 1989); *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988) (holding that a failure to investigate possible evidence could not be deemed a trial tactic where the lawyer did not view relevant documents that were available). As in *Sanders*, Hart's defense counsel was presented with important exculpatory evidence, and like Sanders' attorney, Hart's counsel failed to conduct any investigation regarding that evidence. In short, Hart's

counsel "failed to fulfill his duty to investigate [Hart's] 5D most important defense," *Sanders*, 21 F.3d at 1457, and was, therefore, deficient.

In *Sanders*, we also found that the failure of Sanders' defense counsel to "offer into evidence [the brother's] extra-judicial admission that he was the shooter," provided a "strong basis" for concluding that counsel's performance was deficient. *See id.* at 1457-58. Our conclusion was based on two factors: (1) the evidence would constitute a strong defense to the murder charges against Sanders, and (2) "there was no conceivable strategic or tactical reason not to use this evidence at the . . . trial." *Id.* Both factors are present in the case at bench. First, the evidence corroborating Kendall's testimony would serve to refute the charges that molestation occurred during the period charged in the information. Second, there is no reasonable strategy that could account for defense counsel's failure to introduce this corroborating evidence.[7] Defense counsel called Kendall as a witness and had her testify to the fact that she was with Hart at the ranch at all relevant periods. In doing so, he made the strategic decision to rely on the assertion that Hart was always accompanied by an adult companion when he took his children to the R-Ranch. Having chosen to pursue this line of defense, it is simply inconceivable that defense counsel's decision not to introduce documentary evidence fully *corroborating* Kendall's testimony was a strategic one.[8]

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7. Indeed, the state does not claim on appeal that Braun's decision was a strategic one.

8. Our cases involving a defense counsel's failure to introduce evidence during a sentencing hearing also support the conclusion that petitioner's counsel's failure to introduce Kendall's records constitutes deficient performance. Although the case at bench involves the failure to introduce evidence at trial rather than during a sentencing hearing, the reasoning of our sentencing cases extends beyond the

Like the testimony counsel failed to introduce in *Sanders*, the Kendall records were important to Hart's defense. Accordingly, defense counsel's failure to introduce them amounts to deficient performance under *Strickland*.

To succeed on his ineffective assistance of counsel claim, Hart also must show that he was prejudiced by defense counsel's failures to investigate and introduce into evidence Kendall's records. He must demonstrate that there is a "reasonable probability that, but for counsel's

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sentencing context. In both instances, it is the attorney's failure to introduce evidence central to his client's case that amounts to ineffective assistance. *See, e.g., Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1998) (when the failure to present evidence is not based upon tactical considerations, "we have not hesitated to find deficient performance"). On several occasions, for example, we have found that defense counsel's failure to introduce mitigating evidence -- by calling witnesses and presenting evidence at the sentencing phase of a capital trial -- amounts to deficient performance. In *Clabourne v. Lewis*, 64 F.3d 1373 (9th Cir. 1995), for example, Clabourne's counsel was aware of evidence that would have supported a case for mitigation, but failed to introduce that evidence at the sentencing hearing. *See id.* at 1386. As the court noted, Clabourne's attorney "did not call any witnesses, introduce any evidence of Clabourne's history of mental illness, or argue any mitigating circumstance. . . ." *Id.* at 1383. According to the *Clabourne* court, the failure to introduce evidence, available to counsel at the time of the sentencing hearing, and central to the defendant's case, amounted to deficient performance under *Strickland*. *See id.*

Likewise, in *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1997), the defendant argued that his counsel rendered ineffective assistance by failing to introduce relevant evidence at his sentencing hearing. As the *Correll* court observed, "Correll's attorney failed to call witnesses or present any evidence at the pre-sentencing hearing, although he stated on the record that he knew of people who were willing to testify on Correll's behalf." *Id.* at 1412. Again, the court concluded that the defense counsel's failure to introduce evidence clearly central to the defendant's case amounted to deficient performance. *See id.*

unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The district court denied Hart's petition on the ground that Hart failed to show prejudice.[9] The court believed that the evidence against Hart was so overwhelming that there was not a reasonable probability that the result of the trial would have been different had petitioner's counsel introduced the Kendall receipts and records. We do not quarrel with the district court's method of analysis. In *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986), we held that "ineffective assistance claims . . . must be considered in light of the strength of the government's case." Indeed, we have also held that a defense attorney's failure to call a relevant witness or introduce relevant evidence is not prejudicial under *Strickland*, in a case where the evidence against the defendant is "overwhelming." *See, e.g., United States v. Harden*, 846 F.2d 1229, 1231 (9th Cir. 1988). Here, however, the record simply fails to support the district court's conclusion.

Both the state and the district court point to several pieces of evidence to support their assertion that the evidence against Hart was "overwhelming." At trial, the prosecution introduced the transcript of a telephone conversation between Hart and Nancy Lamp -- Hart's ex-wife and Jennifer's mother -- and a letter written by Hart to Lamp. In both, Hart admits that he had, at some point in the past, sexually molested his daughter. For example, during the telephone conversation which took place in December of 1989, the following exchange took place:

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9. The district court did not conduct an inquiry into whether Hart demonstrated deficient performance. Instead, it concluded that "even if counsel had introduced Kendall's records and receipts at trial, Hart has failed to show a reasonable probability that the outcome of the trial would have been any different."

[Lamp]: Jim, this is Nancy.
[Hart]: Oh, hi Nancy.
[Lamp]: Um, I've talked to Jennifer.
[Hart]: Uh huh.
[Lamp]: And she told me about how you molested her. Why did you do it?
[Hart]: I was sick at the time.

While the transcript amounts to an admission that Hart had molested his daughter, there is no indication from the transcript that Hart molested her during the time period charged in the information. The telephone conversation simply does not provide support for the state's case that Hart molested Jennifer during the essential period of time. Indeed, Hart claimed during the conversation that no misconduct had occurred for several years:

[Hart]: I was sick at the time.
[Lamp]: Well, are you still sick?
[Hart]: No I'm not.
[Lamp]: How do you know you're not going to do it again?
[Hart]: Because I haven't done it for a long time.

The prosecution also introduced a letter written from Hart to Lamp shortly after the phone call took place. In the letter, Hart again admits that he had molested Jennifer at some point in the past. The letter, however, provides no evidence that Hart molested Jennifer during the period of time charged in the information, but rather supports a contrary conclusion. In the letter, Hart admits that he molested Jennifer as a result of what he termed a "psycho-sexual disorder" and a "psychosis." He goes on to write, however, that he "transcend[ed] [his] psychosis" and received "a clean bill of psychological health in 1986."

The prosecution also introduced into evidence material seized by the police from Hart's residence. The parties dispute the weight and effect of this evidence. It is clear, however, that these materials do not bear on the question on which Hart's petition turns: whether the state established that Hart molested his daughter during the one-year period charged in the information.[10/]

In short, contrary to what the district court held and to what the state argues, the evidence against Hart was far from overwhelming as to the specific charges on which he was convicted -- that he molested Jennifer between September 1986 and August 1987.

Here, given Jennifer's testimony that Hart molested her only at the R-Ranch and then only when he was not accompanied on the weekend trip by another adult, if the jury believed Kendall it could not have found Hart guilty beyond a reasonable doubt of the charges contained in the information, or at the least there is a reasonable probability that its verdict would have been different. Because Kendall's receipts and records provided remarkably strong corroboration for her otherwise uncorroborated testimony, their introduction in all likelihood would have convinced the jury that she was not simply a biased witness or one who was not in possession of all the facts; rather they would probably

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10. The district court also pointed to the testimony of Hart's half-sister, Mary Roach. Roach testified that Hart believed there is "nothing wrong with incest. That other cultures in the world see it as no problem." Again, however, the testimony does not establish when Hart told Roach of this belief. Indeed, she was asked if Hart had told her anything about his ideas on incest "[f]rom about 1984 to the present." More importantly, Hart's beliefs about the morality or immorality of incest do not constitute evidence of criminal propensity or activity. *See, e.g., Guam v. Shymanovitz*, 157 F.3d 1154, 1159 (9th Cir. 1998) ("the underlying premise of our criminal system [is] that the defendant must be tried for what he did, not who he is")(internal citations omitted).

have been compelled to conclude that she was telling the truth: that she did, in fact, accompany Hart each time he brought Jennifer (and her brother) to the ranch during the period covered by the information. When defense counsel fails to introduce this type of evidence -- evidence that corroborates a key defense witness whom the jury might otherwise not believe -- confidence in the outcome is necessarily undermined.[11]

Hart has therefore succeeded in demonstrating that defense counsel's failure to investigate and introduce the records corroborating Kendall's testimony was deficient performance and that the failure was prejudicial. Under *Strickland*, he has shown that his attorney rendered ineffective assistance of counsel.

III.
CONCLUSION

Under these circumstances, Hart's conviction cannot stand. The district court's order denying Hart's petition for a writ of habeas corpus is therefore **REVERSED**. We **REMAND** to the district court and **ORDER** that the writ issue.

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11. The fact that the R-Ranch records were introduced into evidence by the prosecution does not alter our conclusion. Although those records might have been used to support Kendall's claim that she was with Hart each time he brought his children to the ranch, defense counsel made no argument to that effect either during cross-examination or in his closing argument. The records themselves, moreover, in no way confirmed Kendall's testimony that she was with Hart each time he took his children to the ranch; they showed only the total number of people in Hart's party. Accordingly, despite the prosecution's introduction of the R-Ranch records, defense counsel's failure to introduce Kendall's own records left the jury with nothing to corroborate Kendall's story. Despite the prosecution's introduction of the R-Ranch records, therefore, we are convinced that there is a reasonable probability that the result of the proceeding would have been different had petitioner's counsel introduced Kendall's own records.

APPENDIX B

FILED
JUN 15, 1999
CATHY A. CATTERSON, CLERK
US COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES THOMAS HART,	)	
Petitioner-Appellant,	)	**No. 98-15932**
	)	
v.	)	**DC# CV 96-00239**
	)	**Northern District**
JAMES GOMEZ, Director,	)	**of California**
Department of Corrections;	)	
THEO WHITE, WARDEN,	)	**ORDER**
Respondent-Appellee.	)	
	)	

Before: KRAVITCH[1], REINHARDT, and T.G. NELSON, Circuit Judges:

The panel has voted to deny the petition for rehearing. Judges Reinhardt and T.G. Nelson have voted to reject the suggestion for rehearing en banc, and Judge Kravitch so recommends.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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1. The Honorable Phyllis Kravitch, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, Sitting by Designation.

ORDER

The opinion filed April 26, 1999 is amended as follows (note that blank lines are not included in line number calculations):

A footnote is added following the second sentence of the first full paragraph at Slip Op. 3816. That footnote reads: "Hart's counsel on appeal did not represent him at trial."

Footnote 6 is amended to read: "Indeed, the state does not claim on appeal that Braun's decision was a strategic one."

Defense counsel's name, Lawrence Braun, is removed form the opinion in every place it appears. Except for the instances noted below, "Braun" is replaced with "defense counsel," and "Braun's" is replaced with "defense counsel's".

At Slip Op. 3816, line 14, ", Lawrence Braun," is deleted.

At Slip Op. 3816, line 16, "Braun" is replaced with "him".

At Slip Op. 3816, line 20, "Braun" is replaced with "him".

At Slip Op. 3817, line 7, "Braun" is replaced with "his attorney."

At Slip Op. 3819, line 13, "Braun" is replaced with "him".

At Slip Op. 3819, line 14, "Braun" is replaced with "he".

At Slip Op. 3821, line 27, "Braun" is replaced with "he".

At Slip Op. 3821, footnote 7, line 2, "Braun" is replaced with "petitioner's counsel's".

At Slip. Op. 3823, line 7, "Braun" is replaced with "petitioner's counsel".

At Slip Op. 3826, line 16, "Braun" is replaced with "his attorney".

At Slip Op. 3826, footnote 10, final line, "Braun" is replaced with "petitioner's counsel".